

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
A & Victor Manufacturing Co., Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years FYE 11/30/76-11/30/78. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of July, 1984, he served the within notice of Decision by certified mail upon A & Victor Manufacturing Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A & Victor Manufacturing Co., Inc.
10 East 39th Street
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of July, 1984.

David Parchuck

James A. DeLuca
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

James A. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 18, 1984

A & Victor Manufacturing Co., Inc.
10 East 39th Street
New York, NY 10016

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
A. Martin Stuchiner
295 Madison Avenue
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| of | : | |
| A & VICTOR MANUFACTURING CO., INC. | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Corporation Franchise Tax under | : | |
| Article 9A of the Tax Law for the Fiscal Years | : | |
| Ended November 30, 1976 through November 30, | : | |
| 1978 | : | |

Petitioner, A & Victor Manufacturing Co., Inc., 10 East 39th Street, New York, New York 10016 filed a petition for redetermination of a deficiency or for refund of Corporation Franchise Tax under Article 9A of the Tax Law for the fiscal years ended November 30, 1976 through November 30, 1978 (File No. 34054).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 11, 1983 at 1:15 P.M., continued at the same offices at 2:00 P.M. on January 12, 1983 and concluded at the same offices on May 27, 1983 with all briefs to be submitted on or before September 20, 1983. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel) at the hearings on January 11, 1983 and January 12, 1983 and by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel) at the hearing on May 27, 1983. Petitioner appeared by A. Martin Stuchiner, Esq. and Theresa Berlin Stuchiner, Esq.

ISSUES

I. Whether the Audit Division failed to investigate the facts before issuing the notices of deficiency.

II. Whether petitioner may claim an allocation of business income based upon maintaining a place of business in Rhode Island.

FINDINGS OF FACT

1. Petitioner filed New York State Corporation Franchise Tax Reports for the fiscal years ending November 30, 1976 through November 30, 1978. On each report petitioner claimed that it was entitled to use a business allocation percentage on the ground that it maintained a regular place of business outside of New York.

2. On March 26, 1981 the Audit Division issued three notices of deficiency, accompanied by statement of audit adjustment, to petitioner, A & Victor Manufacturing Co., Inc. The first Notice was for the fiscal year ended November 30, 1976 and asserted a deficiency of tax of \$50,449.00 plus interest of \$17,687.00 for a total of \$68,136.00. The second Notice was for the fiscal year ended November 30, 1977 and asserted a deficiency of \$71,872.00 plus interest of \$19,089.00 for a total of \$90,961.00. The third Notice was for the period ended November 30, 1978 and asserted a deficiency of \$47,392.00 plus interest of \$8,559.00 for a total amount due of \$55,951.00. Each of the notices was issued to petitioner on the basis of the Audit Division's conclusion, following a field audit, that petitioner did not maintain a regular place of business outside of New York State and consequently could not allocate its income within and without the State.

3. In the course of the field audit, the auditor met with petitioner's accountant, Mr. Leo Fine, on two occasions. The first meeting was on March 10, 1980. At this meeting, which lasted a substantial portion of the business day, Mr. Fine addressed questions posed by auditor Charles Komack. The second meeting took place on June 16, 1980. This meeting lasted one or two hours.

In September, 1980, Mr. Komack began preparing a field audit report. During September, 1980 Mr. Komack left New York State service. In or about October, 1980 one Mr. Saul, who was Mr. Komack's supervisor, reviewed Mr. Komack's report and, based upon his conversations with Mr. Komack, modified certain statements of fact. At this time Mr. Saul concluded that the notices were properly issued. Subsequently, Mr. Schiffman, who was Mr. Saul's supervisor, concurred. The Audit Division considered the audit closed after a conference with petitioner's representative.

4. Petitioner, A & Victor Manufacturing Co., Inc., is a corporation which engages in the manufacture and sale of costume jewelry. Petitioner's principal products are earrings.

5. During the periods in issue petitioner maintained an office in New York City. This office was staffed by a bookkeeper and billing clerks. One person also served as a receptionist. The office was furnished with a computer and a conference table. Petitioner also kept samples in New York.

6. Petitioner's New York City office was utilized to prepare and send the customer's billing. On occasion, petitioner's customers would examine samples at the New York City office. The address reflected on petitioner's stationary showed only a New York City location.

7. Petitioner's jewelry was manufactured by subcontractors located in Rhode Island and Massachusetts.

8. During the periods in issue, most of petitioner's jewelry was manufactured by Annex Glass & Novelty Co. ("Annex Glass") of 1340 Hartford Avenue, Johnstown, Rhode Island.

9. Annex Glass was able and willing to buy raw materials cheaper, faster and under better terms than petitioner could. Accordingly, when petitioner had

an order to manufacture jewelry it would provide Annex Glass with the funds to purchase the raw materials on petitioner's behalf. Smaller orders by petitioner would be filled out of petitioner's stock of raw materials which would be kept at Annex Glass.

10. During the periods in issue Mr. Victor Abitbol, petitioner's president and chief executive officer, had an oral or "gentlemen's agreement" with Mr. Daniel Giovannucci, who was the president and chief executive officer of Annex Glass. The oral agreement provided that, in exchange for showroom and office space, warehouse space, use of a telephone and insurance, petitioner would pay an additional 5 cents per dozen on all finished goods in addition to the price which would have been charged.

11. In accordance with this agreement, Annex Glass would set aside and segregate, by a gate at its premises, the raw materials which it purchased on petitioner's behalf. Annex Glass transformed these raw materials into finished goods which were then set aside and marked petitioner's property. Petitioner also stored molds, boxes and cards of jewelry at Annex Glass.

12. The showroom and office at Annex Glass in Rhode Island had petitioner's name on the door. It contained displays, order forms and samples. It also contained some of petitioner's records and stationery. Petitioner's principals had keys to the office and showroom. Either an officer or employee of petitioner would be present at petitioner's office and showroom in Rhode Island at least forty times a year. On occasion, one or more of these individuals would stay at the showroom for two or three days at a time.

13. During the periods in issue, petitioner had at most four customers. Most of petitioner's business arose from sales to K-Mart Corporation ("K-Mart"). It was the practice of the buyers for K-Mart to visit both the New York City

office and petitioner's showroom in Rhode Island. It was important to the buyers for K-Mart that petitioner have a plant and manufacturing facility at its disposal so that petitioner would have control over production, quality and production dates. If a buyer from K-Mart was dissatisfied with a delivery from petitioner, he would visit petitioner's premises at Annex Glass.

14. The telephone utilized by petitioner at Annex Glass was not listed in petitioner's name. It did not have to be, however, since there were only several customers and they knew how to contact petitioner at its showroom and office at Annex Glass. When Mr. Victor Abitbol made long distance telephone calls from Annex Glass he either charged the cost to another telephone number or called collect.

15. Petitioner did not file tax returns with the State of Rhode Island during the periods in issue.

CONCLUSIONS OF LAW

A. That the issuance of a Notice of Deficiency must be premised upon a factual basis (cf. Matter of Joseph and Jeanette Friedberg, State Tax Commission, January 3, 1983). In view of the fact that an auditor spent most of a business day with petitioner's accountant wherein the auditor's questions were discussed, petitioner has failed to establish that the Audit Division did not examine the facts prior to issuing the notices of deficiency.

B. That Tax Law section 210.3(a)(4) provides in part:

"(T)hat for taxable years beginning before January first, nineteen hundred seventy-eight, if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred percent;"

C. That 20 NYCRR 4-2.2(b), which was in effect during the period at issue, defined "regular place of business", in part, as follows:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business...".

D. That, on the basis of the uncontradicted testimony presented herein, it is found that the office and showroom maintained by petitioner at Annex Glass in Rhode Island constituted a bona fide office which was regularly used by petitioner in carrying out its business within the meaning of 20 NYCRR 4-2.2(b). Accordingly, the Audit Division erred in concluding that petitioner's business allocation percentage was one hundred percent.

E. That the petition of A & Victor Manufacturing Co., Inc. is granted and the notices of deficiency issued March 26, 1981 are cancelled.

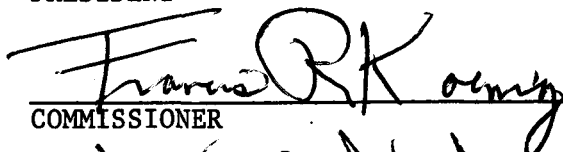
DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984



PRESIDENT



COMMISSIONER



COMMISSIONER